

No. 2486

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

HENRY F. MARSHALL,

*Appellant,*

vs.

SAMUEL W. BACKUS, as Commissioner  
of Immigration for the Port of San  
Francisco,

*Appellee.*

In the Matter of the Application of Henry  
F. Marshall for Writs of Habeas Corpus  
on Behalf of Thirty-five Hindus.

APPELLANT'S REPLY BRIEF.

HENRY F. MARSHALL,  
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*Filed this.....day of May, 1915.*

*FRANK D. MONCKTON, Clerk.*

*By.....Deputy Clerk.*

**Filed**

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F. D. Monckton



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## APPELLANT'S REPLY BRIEF.

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Counsel for appellee declines to squarely assume either of two positions—either that these are cases of expulsion or cases of exclusion. In one portion of his brief he contends for the right to *exclude* these aliens from the mainland; in another he urges the authority of the Secretary's warrant for *expulsion* purposes. For these reasons we have been obliged to point out the illegality of the Depart-

ment's action from both standpoints. We urge that this Court in its decision determine authoritatively whether, in its opinion, these are cases of exclusion or of expulsion.

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## I.

**The Admission of an Alien at any Port of Entry, Whether Insular or Continental, is Admission to the "United States" at Large, and not to any Particular or Limited Subdivision Thereof; and Rule 14 is Therefore Void, as Inconsistent with Law.**

We pointed out in our opening brief that immigration laws are general statutes and therefore of general and uniform operation; that they authorize the admission of aliens to, and their exclusion and expulsion from, the United States as a whole and not to or from some limited portion thereof. Upon this contention counsel declines the issue, and the contention must be deemed conceded.

Section 33 of the Immigration Act specifically includes the Philippine Islands as a part of the United States for immigration purposes, and it follows that admission at Manila is admission to the "United States" equally with admission at a continental port. And such admission includes, as of course, the right to freely pass to and fro within the territory of the "United States", whether insular or continental, unless expressly forbidden by law.

That this point, as here presented, is new is obvious from the fact that counsel for appellee in his brief can cite no authority other than this Court's recent opinion in the case of *Healy v. Backus*. It is true that, in that case, this point was referred to, but we submit that it escaped the Court's attention by reason of its merely casual presentation.

The portion of that opinion relied upon by appellee sets forth the effect of Rule 14, before and after amendment, substantially as follows, the verbiage being ours:

Rule 14, before amendment, declared that aliens admitted to the Philippines are admitted to the United States at large and may pass where they please without further examination.

Rule 14, as amended, declares that aliens admitted to the Philippines are *not* admitted to the United States at large and may *not* pass to the mainland without further examination.

In the last analysis the rule, both before and after amendment, is in legal effect merely a declaration of what, in the Commissioner-General's opinion, is the proper interpretation of the law (directing what his subordinates shall do under such interpretation). He says, first, "The Philippines are part of the United States, and you will act accordingly"; then he changes his mind, and says: "The Philippines are not a part of the United States". Both of these declarations are by executive order, promulgated, it is claimed, under author-

ity of a power to establish rules and regulations (Sec. 22, Immig. Act).

These two interpretations are contradictory and squarely adverse, one to the other. The statute law in the premises has not been changed. It follows that one of the interpretations is correct and right, and that the other is wrong, incorrect, "inconsistent with law" and therefore void. And the question is, "Which?"

The construction for which we contend has received the sanction and approval of the authorities for over fifteen years. The construction, which the Department now seeks to establish, is an after-thought and a subterfuge. It was evolved in 1913 for the express purpose of removing, from the mainland, races of people which Congress and the Department were willing should be admitted and inhabit the Philippines, but which the immigration authorities (and not Congress) believe should be kept out of continental territory. In fact Congress, at its last session, refused to enact proposed legislation which would effect directly what it is hereby sought to accomplish indirectly.

The subsisting Act of Congress declares that the Philippines are part of the United States; the Commissioner-General's rule holds otherwise and directs his subordinates to act accordingly.

The question is squarely before this Court: Shall the Act of Congress prevail, or shall an executive order over-ride the statute law?

We submit that this Court must hold that Rule 14, as amended, is void.

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## II.

### **The Secretary of Labor has no Jurisdiction to Review, Directly or Indirectly, the Decision of Philippine Island Officials.**

Counsel for the appellee contends that the action of the Secretary, under consideration here, is not an attempted review of the decisions of insular officials. By such contention and the evasion of the issue as offered, he concedes that *if it were such attempted review* it is beyond the powers conferred on the Secretary by statute.

Judge Dooling, in his decision, goes far beyond the utmost claims of the immigration authorities when he holds that aliens coming from the insular possessions have the same status so far as exclusion goes as aliens coming direct from foreign territory. The language of the opinion (appellee's brief, p. 6) is as follows:

I am of the opinion that \* \* \* the immigration officers may prevent the entry to the mainland of aliens who have heretofore been permitted to land at Manila for any reason which would lawfully operate to prevent their landing here, in the first instance, if they had never gone near the Philippines.

And this Court, in *Healy v. Backus* (appellee's brief, p. 4), held similarly that an alien coming

from the Philippines might yet be excluded from the mainland on the ground that "he is one of the excluded classes".

Taking these decisions as expressing correctly the law (which we do not concede) it follows necessarily that the Philippines, for the purpose of exclusion from the mainland, must be considered as quasi-foreign territory. The alien, then, arriving from Manila, is in precisely the same position as though arriving directly from abroad. For this Court cannot hold that his status is worse by reason of his residence under the flag.

Conceding all the foregoing to be true and correct, yet this case must be reversed.

An alien, whether from foreign or quasi-foreign territory, must be excluded from the mainland, if at all, by reason of his condition at the time he applies for admission thereto.

Ex parte Watchorn, 160 Fed. 1014;

Ex parte Koerner, 176 Fed. 478.

An Italian, who had lived in London and applies for admission at New York, would have, under the above theory of the law, precisely the same status as a Hindu, who has lived in Manila and applies at San Francisco. Both may have been paupers when reaching London and Manila; both, by a combination of industry and luck, may have acquired in their respective cities of temporary residence a fortune of \$10,000. But, under the government's contention in the present case, the Italian would be

admitted, while the Hindu, though a rich man now, would be excluded because *at the time he entered Manila* he was a pauper and excludable.

The government and this Court must take one of two positions; either Manila is foreign territory for the purpose of excluding its aliens from the mainland, or it is not. There is no middle ground.

If it is such territory, the alien arriving therefrom must be excluded by reason of his condition *at the time he arrives at the mainland*; if it is not, he cannot be *excluded* at all.

The sole charge upon which it is sought to expel (or exclude, if the Court prefers) these aliens is that "at the time they landed in Manila" they were likely to become public charges. There is no charge that they now are or were at the time of reaching San Francisco likely so to become. To the contrary, as a matter of law, the government, by not charging to the contrary, admits that they were then and are now neither public charges nor likely to become such.

If this matter be one of *exclusion* from the mainland, it is neither charged nor proven that the aliens were at time of application members of the excluded classes. To the contrary it is admitted that they were not such, and the order of exclusion must be reversed.

Moreover, if it shall be determined by this Court that these are cases of *exclusion* from the mainland, then these aliens have been unlawfully deprived of

the benefit of a trial before a Board of Special Inquiry, as provided by Sections 24 and 25 of the Immigration Act, and for this reason also the decision must be reversed.

But we contend that this is not a case of *exclusion* from the mainland, but of *expulsion from the United States*.

The law says that the Philippines are part of the United States for immigration purposes; it confides the decision of immigration questions affecting applicants at Philippine ports to certain officials; it does not provide for the review of such decisions by the Secretary of Labor when such aliens proceed to the mainland after admission.

Counsel for appellee admits that such review is not contemplated. He denies that the proceeding under discussion is such review, and says it is merely the correction of the mistakes of Manila officials. This is a distinction without a difference and unworthy of discussion.

Finally counsel fall back on the plea that it is unthinkable that a situation has arisen which is not within the provisions of the law. That such situations are continually arising and have to be met by further legislation is quite within the experience of every lawyer and every Court. Such a situation in immigration matters arose regarding laborers with limited passports and was met by additional legislative enactment.

The Court should uphold the law as it is, and should not permit the Department to twist existing statutes to meet conditions which they do not and never were intended to cover, merely because the Commissioner-General believes that such should be the law.

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### III.

#### **There is a Substantial and Material Difference Between the Exclusion of an Alien Applying for Original Admission and the Expulsion of an Alien Theretofore Duly Admitted.**

This point is formally conceded by counsel for appellee and would require no further discussion were it not that counsel wrongfully assumes, as a premise for the next point to be considered, that the law makes final the decision of the Secretary in *exclusion* matters. Such is not the law.

**In no immigration matter whatsoever does the law make final the decision of the Secretary of Labor.**

The law does make final, in *exclusion* matters, the decision of certain immigration officers *other than the Secretary*. And in certain of these cases the decision of such officers is final without appeal to the Secretary; in others such appeal is allowed.

Section 10 of the Immigration Act provides:

That the decision of the board of special inquiry, hereinafter provided for, based upon the certificate of the examining medical officer, shall

be final as to the rejection of aliens afflicted with tuberculosis, etc.

And Immigration Rule 17, relating to appeals, provides:

Subd. 4. *Where no appeal lies.*—No appeal lies where the decision of a board of special inquiry, based solely upon the certificate of the examining medical officer, rejects an alien because \* \* \*

Subd. 5. *Where no appeal lies, but admission on bond may be requested.*—No appeal lies where a decision of a board of special inquiry, based *solely* upon the certificate of the examining medical officer, rejects an alien because he is suffering \* \* \*

There being no appeal to the Secretary, it is evident that there is no finality accorded to his decision under this provision.

But Section 25, which alone is relied on for the doctrine of the finality of the Secretary's decision, specifically mentions Section 10, and must therefore be read therewith. The first-mentioned section, after providing that in *exclusion* cases the decision of the "appropriate immigration officers" shall be final subject to an appeal to the Secretary, continues:

But nothing in this section shall be construed to admit of any appeal in the case of an alien rejected as provided for in section ten of this act.

Reading these two sections together (and the Act must be construed as a whole) it is evident that

the “appropriate immigration officers” mentioned in Section 25 and the “board of special inquiry” in Section 10 are one and the same. And it is their decision alone, and only in exclusion cases, which is made final, in the one instance with and in the other without the right of appeal.

There being no other provision in the law making anybody’s decision final, it must be held that the decision of the Secretary is not made final by the law and therefore is subject to review by a federal Court. And such review is all we seek.

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#### IV.

### **It is the Right and Duty of Federal Courts on Habeas Corpus to Examine Into the Merits of Expulsion Cases, There Being no Finality Attached to the Decision of the Secretary of Labor.**

Having demonstrated that the statute law nowhere renders final the decision of the Secretary in expulsion cases, it remains only to examine whether or not there are Court decisions (court-made law, so to speak) declaring such finality and therefore precluding an examination into the merits on habeas corpus.

It is appellant’s position that there are no such decisions, that the decisions in point, on the contrary, support our position, and that for that reason the lower Court in the case at bar should have examined into the merits.

## CASES CITED BY APPELLEE.

Four cases only are cited by our opponents, and these we will examine in the order of their decision in point of time.

**Fong Yue Ting v. United States, 149 U. S. 698.**

This case is the first in which the doctrine of finality of the decision of executive officers in immigration matters was discussed. The opinion says:

The power of Congress, therefore, to expel, like the power to exclude aliens, or any specified class of aliens, from the country, *may* be exercised entirely through executive officers; or Congress *may* call in the aid of the judiciary to ascertain \* \* \*

The very important distinction between what Congress *may do*, and what it *has done*, in the way of legislation, cannot be disregarded here. Moreover the case was decided in 1893, long before the passage of the Immigration Act, and can in no case be considered authority on the question of what Congress *has done*, which is the sole question here.

**The Japanese Immigrant Case, 189 U. S. 86.**

This alien "clandestinely entered" the United States by escaping from a ship at Seattle, and had never been "duly landed" as had the persons in the present case. On its merits, while *in form* an expulsion case, it was one of exclusion and was so treated by the Court. The question of the finality of the *Secretary's* decision in expulsion cases was

neither raised nor decided. To the contrary the Court (in the last paragraph) said:

As no appeal was taken to the Secretary from the decision of the Immigration Inspector, *that decision* was final and conclusive.

A case which holds that the decision of the inspector was final and conclusive because no appeal was taken, is not authority for the finality of the Secretary's decision where there is no appeal.

A case holding that the inspector's decision is final, in the absence of an appeal, upholds our contention that it is the decision of the inspectors and not the Secretary which is made final by the law.

**Prentiss v. Stathakos, 192 Fed. 467.**

In this case the learned judge recited the rule as it obtains in *exclusion* cases, referring also only to *exclusion* authorities; continuing he says:

While need for such a provision is obvious in the first mentioned instance of landing at the port of entry, doubtless a different rule might reasonably be provided for hearings thereafter.

It is true that he *assumed* that the same rule applied to *expulsion* cases, but the point here raised was neither discussed nor decided. The case is not authority on the present question.

**Lewis v. Frick, 233 U. S. 291.**

The language quoted by counsel in his brief was not part of the Supreme Court's decision in this case; it was merely a statement of what had been

held by the lower Court. And the Supreme Court, as to the first part thereof, declared it to be error, and as to the rest pointedly refused to approve, deciding the case on other grounds.

In the decision of that case in the Circuit Court of Appeals, from which that appeal was taken (reported in 115 C. C. A. 493), the appellate Court recited the rule as it obtains in *exclusion* cases. It formally recognized the rule as being, by the statute, *confined to exclusion cases*, but expresses its opinion that the principle may be *extended* to cases of expulsion also, basing its conclusion solely upon *Bates & Guild Co. v. Payne*.

The latter case was a suit in equity in which was upheld the conclusive right of the Postmaster-General to determine whether certain mail matter should pass second or third class. To argue that, because one official has exclusive power to determine whether a magazine shall pay one cent or two cents postage, therefore another has conclusive power to determine whether human beings may remain in the United States or not, is to resort to far-fetched reasoning of the most vicious character. And this reasoning the Supreme Court pointedly declined to countenance. The true rule in such case is better expressed in the case of *St. Louis etc. Ry. v. U. S.*, (188 Fed. 191) where the Court said:

It (the statute) may not be extended by construction to those who are not within the class of parties denounced by it nor to acts which are not by the expressed will of the legislature

clearly made offenses under it, although such parties and acts may in the opinion of a court be as vicious as those within its terms.

Regulations of the Secretary of Agriculture are ineffective to add to the classes \* \* \* or to the acts denounced by the statute.

A legislative body may delegate to an executive the power to find some fact or situation on which the operation of the law is conditioned or to make and enforce regulations for the execution of a statute according to its terms.

It cannot, however, delegate its law-making power, its power to exercise the indispensable discretion to make, add to, to take from or modify a statute.

#### CASES IN APPELLANT'S FAVOR.

The sole case in all the reports, in which the precise question here involved, to wit, the finality of the Secretary's decision in expulsion matters, is discussed and decided, is that of *Redfern v. Halpert*, (108 C. C. A. 262) cited in our opening brief at page 22. Counsel seeks to belittle the decision. He says that "It is an isolated case and has never been followed, and is directly contrary to all Supreme Court opinions". If this be true, and it is not, it is strange that counsel has not cited a single case in which this precise point is raised and discussed, much less decided to the contrary.

The case is a recent one, decided in March, 1911, just four years ago. It is the only one in which this point is raised, and it has never been reversed. It is therefore the law of the land and is absolutely conclusive. And other cases, by inference at least,

support the decision. For the convenience of the Court a few of the expressions to that effect are recited.

**Redfern v. Halpert, 108 C. C. A. 262.**

*Syllabus.* The decision of the Secretary of Commerce and Labor in proceedings to deport an alien under the Immigration Act is not final; but the Court on habeas corpus may inquire into the whole case.

*Decision.* I find nothing in the law making the decision of the Secretary of Commerce and Labor final, and I am satisfied I have the right to inquire into the whole case.

**Gonzales v. Williams, 192 U. S. at 15.**

If the person does not come within the provisions of the act the Commissioner (Secretary) had no jurisdiction to detain and deport her by deciding the mere question of law to the contrary.

**Davies v. Manolis, 179 Fed. 818 (C. C. A.).**

The final determination of the statute applicable to the case and the interpretation of the grant of power therein cannot rest with the executive officers under any authority cited; nor can such finality of executive decision have sanction under our system of government.

**Fong Yue Ting v. United States, 149 U. S. 698.**

(Three Justices dissenting as to the *power* of Congress to make final executive decisions in *expulsion* cases)

BREWER, J. (p. 738). Whatever may be true as to exclusion \* \* \* I deny that there is any arbitrary and unrestrained power (in Congress) to banish residents, even resident aliens \* \* \*

FULLER, C. J. (p. 762). Conceding that the exercise of the power to exclude is committed to the political department and that the denial of entrance is not necessarily the subject of judicial cognizance, the exercise of the power to expel, the manner in which the right to remain may be terminated, rest upon different ground.

FIELD, J. (p. 755). I utterly dissent from and reject the doctrine that "Congress, under the power to exclude and expel aliens, might have directed (them) to be removed out of the country by executive officers, without judicial examination, just as it might have authorized such officers to prevent their entrance to the country.

It is thus seen that the distinction between *exclusion* and *expulsion*, which we make in this case, has been recognized by the Courts for over twenty years; also that executive decisions may be made final in the one instance without being final in the other. The only case in which this point was decided held that the Secretary's decision is *not* final, and this Court will follow the law as it is and not as some executive believes it should be.

As to the evils, which the acting Commissioner-General anticipates from following the law as it is, (appellee's brief, page 13), they may or may not happen. If they do, the remedy is in the hands of Congress and should be sought by the Department in the halls of legislation and not by attempt to impose upon this Court a strained construction of existing statutes, tortured to confer powers and meet circumstances which they were never designed or intended to meet or confer. The opinion of the *act-*

ing Commissioner-General, (a layman, who was then merely the chief clerk of the Bureau, and is now an inspector and assistant commissioner at New York), is unworthy the prominence and weight accorded it by counsel.

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## V.

### **The Warrants Issued by the Secretary of Labor do not State a Cause Against These Aliens, Whether for Exclusion or Expulsion.**

If these cases be considered as cases of "exclusion from the mainland", as seems to be the case under the opinion in *Healy v. Backus*, the warrants do not state a cause for exclusion in that the alleged cause is not a *present subsisting circumstance* at the time of their application for admission to the mainland.

Ex parte Watchorn, 160 Fed. 1014;

Ex parte Koerner, 176 Fed. 478.

If these cases be considered as cases of expulsion from the United States, and we hold that they must be so considered, the warrants do not state a cause for expulsion by reason of the fact that they negative the decision of Philippine officials as to the admissibility of these persons to enter the United States at the time they entered Manila. This decision is a present subsisting decision by the only officer having authority to determine that question. And the recital to the contrary in the warrant is of no force and effect.

Counsel for appellee in his brief (page 6) sets forth that:

In the Philippine Islands the proper immigration officials' decision is conclusive anywhere within the jurisdiction of their geographical territory.

We have shown that the law withholds from the Secretary of Labor the right to review such decision and in the absence of such right the decision of the Philippine official is conclusive, not only in the Philippine Islands as set forth in counsel's brief, but also throughout the United States.

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### Conclusion.

Aside from the naked legal proposition, there are good reasons why the Secretary's decision in expulsion cases should not be final even while the decision of immigration officials in exclusion cases has such status.

An alien applying for admission has the benefit of an examination before an inspector, of a trial before a Board of Special Inquiry, and, if he so desires, of an appeal to the Secretary. And no alien can be finally *excluded* without at least two hearings, that before the inspector and that before the board.

An alien residing within the country, however, if appellee's contention is to be sustained, can have the benefit of only one hearing before a single indi-

vidual. And that hearing, if it be due process of law which we doubt, consists, not of a personal appearance before the Secretary where his physique, credibility and the character of the evidence can be determined by the person in whose hands his whole future rests, but of affidavits, ex parte statements and a cold typewritten record.

It is inconceivable that Congress intended that a stranger to the country, attempting to enter for the first time, should be granted privileges and a measure of protection of his rights against injustice, and at the same time intended that the resident should be denied the same privileges and the same measure of protection.

Dated, San Francisco,  
May 10, 1915.

Respectfully submitted,

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